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by

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I. Introduction and Summary

Earlier this week, the D.C. Circuit issued its long-awaited decision in *Mozilla v. Federal Communications Commission*.[1] The court affirmed the Commission's *Restoring Internet Freedom (RIF) Order*, identifying some flaws in the agency's reasoning but finding the agency could likely correct those errors on remand without vacatur.[2] Though largely expected given the Supreme Court's precedent in *Brand X*,[3] the decision is nonetheless a sweeping victory for the Commission and judicial validation of Chairman Ajit Pai's light-touch regulatory framework for the broadband industry.

While chastened by the ruling, some net neutrality advocates have identified a potential silver lining.[4] The court vacated the portion of the *RIF Order* that expressly preempted state and local broadband regulations.[5] The court found that the order failed to ground the express preemption provision in a lawful source of statutory authority.[6] Advocates have latched onto this holding as permission for legislatures to reimpose at the state level the restrictions that the Commission repealed at the federal level.

But these advocates are likely to be disappointed, as this reads too much into the court's decision. Any state effort to regulate broadband providers is still subject to conflict preemption

on a case-by-case basis. As the court explained, "[i]f the Commission can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption."[7] The court recognized that the Order created a "light-touch" regulatory regime that relies on transparency and disclosure requirements against a backdrop of consumer protection and antitrust law to protect consumers, an approach that the court found reasonable. State laws that disrupt this carefully balanced federal policy are likely to be preempted—not by the *RIF Order* itself, but by the Supremacy Clause. In other words, it is unlikely that the courts will allow the Internet—which, by definition, cannot possibly be segregated into interstate and intrastate components—to be governed by state legislators or other local officials in Sacramento, California, or Montpelier, Vermont.

II. *Mozilla* on Preemption

Though the Commission has flip-flopped over the years on the proper regulatory treatment of broadband, it has consistently preempted state efforts to regulate broadband. The 2010 *Open Internet Order* explained that the Commission has authority to preempt state regulations that interfere with valid federal objectives and announced it would preempt state laws on a case-by-case basis.[8] The 2015 *Open Internet Order* was more explicit, explaining it would preempt "state regulations that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies."[9] Similarly, the *RIF Order* expressly preempted "any state or local measures that would effectively impose rules or requirements" that the order repealed or rules that would otherwise be "inconsistent with the federal deregulatory approach" taken in the order.[10]

The *Mozilla* court vacated this express preemption provision, finding that the agency failed to ground the clause in a lawful source of statutory authority.[11] The court correctly noted that the Commission may preempt state law "only when and if it is acting within the scope of its congressionally delegated authority."[12] The *RIF Order* cites two sources of authority: the Impossibility Exception, which allows the agency to regulate intrastate communications where it is impossible to separate the intrastate and interstate components of a service, and the federal policy of nonregulation. The Court found that neither of these doctrines constitutes an affirmative grant of authority to which the express preemption provision could be tethered.

But while vacating the *express* preemption provision, the court was careful to preserve the issue of *conflict* preemption, labeling it "wholly premature."[13] Conflict preemption occurs when a state law "frustrate[s] the accomplishment of a federal objective."[14] The agency cannot assert conflict preemption in the abstract, as the *Mozilla* court explained:

> Because a conflict-preemption analysis involves fact-intensive inquiries, it mandates deferral of review until an actual preemption of a specific state regulation occurs. Without the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the 2018 Order.[15]

The dissent worries that *Mozilla* has opened the floodgates of state broadband regulation, in which "the most draconian state policy trumps all else" and rendering the *RIF Order* meaningless."[16] But the majority responds this is not so: "If the Commission can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption."[17]

III. Conflict Preemption and State Net Neutrality Efforts

At first blush, it may seem odd that *Mozilla* can strike down the *RIF Order*'s preemption clause, and yet leave the door open for a future court to nonetheless find a state law is preempted. The resolution of this seeming conundrum lies in the difference between express and conflict preemption. Whereas express preemption turns on congressional intent – whether Congress has granted the agency authority to preempt state law in an area – conflict preemption focuses on the effect of dual sovereigns pursuing different objectives in an area of shared regulatory authority. Where state law frustrates the accomplishment of a federal objective, the state law must yield – preempted not by some express statutory or regulatory command, but by the Supremacy Clause itself.[18]

The Supreme Court's decision in *Geier v. American Honda Motor Co.* illustrates how conflict preemption works in an analogous regulatory environment.[19] *Geier* involved an automobile safety standard promulgated by the Department of Transportation pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, which granted the agency broad authority to establish "appropriate Federal motor vehicle safety standards" in the public interest.[20] After experimenting with several different standards over time that varied in onerousness, the agency settled on requirement that automobile manufacturers equip some, but not all, of their vehicles with passive restraints such as airbags.[21] After being injured in an automobile crash, the plaintiff sued the manufacturer, arguing that failure to provide an airbag violated state tort law despite being in compliance with the federal standard.[22] The Act contained an express preemption clause, but the court found this inapposite, as the clause did not address tort claims. Nonetheless, the court found that the tort claim conflicted with the federal standard.

The plaintiff argued that the agency merely set a minimum airbag standard, and states were free to adopt more stringent requirements above that minimum.[23] But the court found otherwise, noting the agency "deliberately provided the manufacturer with a range of choices among different passive restraint devices" designed to "bring about a mix of different devices introduced gradually over time."[24] The agency specifically rejected an all-airbag standard, in part because of concerns about public backlash.[25] The court found the state law claim was preempted because a "rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed."[26]

The *RIF Order* reflects a similar exercise of the agency's judgment regarding the appropriate way to regulate the broadband industry. In *Brand X*, the Supreme Court held that the Telecommunications Act's definitions were ambiguous, and therefore the Commission was free to classify broadband Internet access service as either a Title I information service or a Title II telecommunications service.[27] The scope of the agency's Title I power varies, based upon how the agency interprets ambiguous grants of authority like Section 706 and what rules the agency

determines are helpful to execute its clearly defined statutory powers. The scope of Title II also varies, as the statute gives the agency the power to forbear from applying particular provisions if the agency determines that "enforcement of the regulation or provision is not necessary" or if forbearance is otherwise "consistent with the public interest."[28]

This flexibility creates a broad menu of potential regulatory options for the agency to choose from, all of which are permissible under the Communications Act as interpreted by *Brand X*. On one end of the spectrum, the agency could opt for a policy of complete nonregulation, disclaiming any interest in broadband whatsoever. On the other end, it could apply the full panoply of Title II obligations to broadband providers, up to and including rate regulation pursuant to tariffs filed with the Commission. Between these poles lie a host of potential regulatory bundles, including minimalist Title I requirements, a more robust common-law regulatory structure constructed using a more intensive Title I process, or a Title II-lite regime that waives most, some, or virtually none of that chapter's traditional common carriage requirements.[29]

The *RIF Order* represents the agency's policy judgment regarding the optimal regulatory bundle from among these options. Contrary to the claim made by some net neutrality advocates, the agency did not foreswear any jurisdiction over broadband access and abandon the field. Rather, it opted to classify broadband as an information service and subject it to specific transparency and disclosure obligations, coupled with enforcement of existing consumer protection and antitrust laws. But it decided against more intensive common carrier-like economic restrictions, which were likely to harm consumers and innovation. Significantly, the *Mozilla* court found this analysis to be a reasonable exercise of the Commission's authority.[30]

Therefore courts are likely to find that most state net neutrality initiatives "frustrate the accomplishment of a federal objective" by imposing duties that the Commission explicitly repealed as harmful and by reducing the flexibility that the Commission recognized as important to future growth. Here, as in *Geier*, the agency has adopted a careful regulatory scheme that balances trade-offs between more and less onerous requirements. More onerous state restrictions upset that balance and therefore are likely to be found preempted by the Supremacy Clause.

The *Mozilla* court was not inclined to entertain these questions about potential conflict preemption in the abstract. But we may not have to wait long for courts to answer the question that *Mozilla* left open. Several states have already adopted net neutrality-like regulations by statute or by executive order, and (at least) two of those are the subject of live federal lawsuits challenging them as preempted: California's SB822, and Vermont's S289.

A. California: Regulating the Internet from Sacramento

SB822, the California Internet Consumer Protection and Net Neutrality Act, is the most aggressive state net neutrality statute passed in the wake of the *RIF Order*.[31] Then-governor Jerry Brown signed the bill into law in September 2018, and the same day the Justice Department filed suit to enjoin the law.[32] Both the statute and the case were stayed last year pending the *Mozilla* decision. Now that that case has been decided, and assuming the court's decision becomes final,

the district court in California can take up the preemption question at the center of the Justice Department's suit.

California cannot seriously argue that SB822 does not "frustrate the accomplishment of a federal objective" established by the *RIF Order*. The legislative history acknowledges that the act "adopts the main components of the net neutrality rules repealed by [the FCC]."[33] Perhaps most notably, SB822 bans broadband providers serving California customers from engaging in paid prioritization. The *RIF Order* found that such bans chill innovation by both broadband and edge providers by limiting quality-of-service agreements, reduce economic efficiency, and harm consumer welfare.[34] Permitting paid prioritization can improve network efficiency and potentially help narrow the digital divide.[35] SB822 also prohibits blocking and throttling, rules that the *RIF Order* found unnecessary given the near-universal condemnation of these practices and the scant evidence of such behavior.[36] SB822 also reinstates the general conduct standard, which the RIF Order condemns because its vagueness creates regulatory uncertainty and thus hinders innovation.[37] Together, the *RIF Order* found these rules reduce overall network investment, a conclusion that the *Mozilla* court found reasonable.

In some ways, the California statute reaches further, adopting rules that even the 2015 *Open Internet Order* declined to enact. For example, SB822 prohibits zero-rating, a practice that the 2015 Order preferred to address on a case-by-case basis because the practice could benefit consumers. It also regulates broadband providers' traffic exchange practices, including setting an effective rate of zero for direct-connection agreements regarding Internet traffic. By comparison, the RIF Order found that "freeing Internet traffic exchange arrangements from burdensome government regulation, and allowing market forces to discipline this emerging and competitive market is the better course."[38]

California could try to argue that its rules apply only to intrastate communications and therefore have no effect on interstate transmissions, but this is fundamentally flawed. The *RIF Order* found that "Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications."[39] This finding was not challenged on appeal, and comports with the Commission's consistent treatment of Internet access as a jurisdictionally interstate service – a classification that goes back over two decades to broadband's infancy.[40]

The purpose of the *RIF Order* was to subject broadband providers to a light-touch regulatory regime and eliminate the 2015 order's common carriage-based rules. The effect – indeed, the express purpose – of SB822 is to reimpose the very regime that the *RIF Order* found harmful to consumers and innovation, with additional restrictions that even the Obama FCC declined to adopt. The court should have no trouble showing that SB822 frustrates the carefully-calibrated balance of oversight and freedom captured in the *RIF Order*.

B. Vermont: Substituting the Power of the Purse

The second statute currently in litigation is from Vermont. Rather than directly re-imposing net neutrality restrictions on broadband providers, as California has done, Vermont requires companies to adhere to such requirements as a condition of receiving government contracts. Under Vermont's S289, state contracts for Internet access must include a state certification that the provider does not engage in blocking, throttling, paid prioritization, or unreasonable interference in the state.[41] This case was challenged by a broadband consortium on preemption grounds.[42] Like the California case, this suit was stayed pending the outcome of *Mozilla*, so the court may soon confront the question of conflict preemption.

While the use of procurement law is an interesting twist that makes Vermont's statute less intrusive than California's, ultimately I suspect this statute will be preempted as well. The state is free to attach conditions to services that it purchases for its own use. So if Vermont merely required government contractors to guarantee net-neutral service to the government, it would likely be upheld. But the Supreme Court has repeatedly warned that "courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power."[43] For example, in *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, the Supreme Court preempted a statute that prohibited the state from contracting with certain repeat violators of the National Labor Relations Act, on the ground that the additional penalty increased, and therefore conflicted with, the remedial scheme provided under the Act. The Court found it immaterial that "Wisconsin has chosen to use its spending power rather than its police power."[44]

Crosby v. National Foreign Trade Council is also instructive.[45] In the late 1990s, the federal government enacted a measured set of economic sanctions against Burma.[46] Massachusetts enacted its own statute that prohibited the state from contracting with companies that did business with Burma, even if those companies were in compliance with the federal regime.[47] Like the net neutrality executive orders, the goal was to put pressure on companies to adopt voluntary practices that federal law refused to impose directly. Yet the Supreme Court unanimously preempted the Massachusetts law because it "conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions" in "clear contrast to the congressional scheme."[48]

Because the Vermont statute reaches beyond the terms of the government's own contracts and instead attempts to regulate relationships between broadband providers and their customers, the act is an attempt to advance general societal goals, not the state's proprietary interest. As a result, general conflict preemption principles apply, and the statute should be found preempted for the same reason the California state should be.

C. Declaratory Ruling

One question facing the Commission on remand is whether to trust the Justice Department to prosecute the California and Vermont cases, or whether the agency should issue a Declaratory Ruling itself that one or both statutes are preempted due to conflict. As numerous commenters have pointed out, the Declaratory Ruling is a procedural vehicle well-suited for this initiative.

Indeed, as recently as 2015, the Commission used a Declaratory Ruling to preempt state laws prohibiting municipal broadband (a decision that was later vacated on other grounds).[49]

One reason the Commission might consider going this route is to offer its expert analysis of the true conflict between state and federal law, without being accused of merely taking a convenient position for the sake of litigation.[50] As the author of the *RIF Order*, the Commission is the expert regarding whether a particular state provision conflicts with federal objectives. Its analysis is likely to help courts conduct their own preemption analyses. As the *Geier* court explained, "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements."[51] Here, the *RIF Order* clarified that "common-carriage requirements akin to those found in Title II," as well as any other obligation equivalent to "rules or requirements that we repeal or refrain from imposing today," would "pose an obstacle to or place an undue burden on the provision of broadband Internet access service" and would "conflict with the deregulatory approach we adopt today."[52] A Declaratory Ruling examining, for example, California's SB822, could clearly and explicitly identify the points of conflict with the *RIF Order*. "In these circumstances," held the *Geier* Court, "the agency's own views should make a difference."[53]

IV. Conclusion

By vacating the *RIF Order*'s express preemption provision, the *Mozilla* court left the door open for some state regulation of broadband services. But the opening is more like a crack than a wide swing. Under the principles of conflict preemption, states can only enact laws that do not frustrate a federal scheme. Where, as here, the federal rule establishes both the floor and ceiling of behavior, state laws survive conflict preemption only if they are consistent with the federal rule.

There are many ways a state broadband statute could comport with the *RIF Order*. For example, a statute that provides an identical transparency and disclosure obligation, but which includes a different state-specific remedy for violations, may be consistent with the federal plan. So, too, could be general state consumer protection laws as applied to broadband providers. As the *RIF Order* itself explains, "we do not disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives."[54] Moreover, state broadband laws that supplement federal policy in different ways would be welcomed. Vermont's S289, for example, requires the Attorney General to conduct a net neutrality study and creates a connectivity initiative to prioritize and fund broadband buildout into unserved and underserved areas, neither of which are inconsistent with the *RIF Order*.

But state laws that simply reimpose restrictions that the FCC has repealed are doomed to fail. Even if they survive conflict preemption, state laws that regulate what is inherently an interstate – indeed, global – network could run afoul of the Dormant Commerce Clause, as I discussed in an earlier *Perspectives* article.[55] Both doctrines push toward the same laudatory goal: to prevent states from balkanizing the Internet and undermining the Federal Communications Commission's role as the nation's primary regulator of interstate communications.

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[1] Mozilla v. Federal Communications Commission, No. 18-1051 (D.C. Cir. Oct. 1, 2019).
[2] Id.
[3] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
[4] See, e.g., Craig Aaron & Heather Franklin, *Silver Lining to Today's Net Neutrality Court Loss*, Oct. 1, 2019, available at https://www.freepress.net/our-response/expert-analysis/explainers/silver-linings-todays-net-neutrality-court-loss.
[5] *Mozilla* at 121.
[6] Id.
[7] Id. at 142-143.
[8] Preserving the Open Internet, 25 FCC Rcd. 17905, 17970 n.374 (2010).
[9] Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5804 (2015).
[10] Restoring Internet Freedom, 33 FCC Rcd. 311, 427 (2018) ("*RIF Order*").
[11] *Mozilla* at 121.
[12] Id. at 122-123 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).
[13] Id. at 145.
[14] Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 873 (2000).
[15] *Mozilla* at 136-137 (quoting Alascom, Inc. v. FCC, 727 F.2d 1212, 1220 (D.C. Cir. 1984) (internal quotation marks removed).
[16] *Mozilla* (Williams, J., dissenting) at 1, 23.
[17] *Mozilla* at 142-143.
[18] *Geier*, 529 U.S. at 873.
[19] Id. at 861.
[20] National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 et seq. (repealed by Pub.L. 103-272 § 7(b), July 5, 1994, 108 Stat. 1379).
[21] *Geier*, 529 U.S. at 864.
[22] Id. at 865.
[23] Id. at 874.
[24] Id. at 874-875.
[25] Id. at 879.
[26] *Id*. at 863.
[27] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
[28] 47 U.S.C. § 160 (2018).
[29] See, e.g., Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1041 n.64 (2012) (discussing Title II–lite regime).
[30] *Mozilla* at 85-86.
[31] S.B. 822, Sen. Reg. Sess. (Ca. 2018).
[32] See Larry Downes, *California's Net Neutrality Publicity Stunt Comes to an End*, FORBES, Oct. 29, 2018; United States v. California, No. 2:18-at-01539 (E.D. Cal, filed Sept. 30, 2018).
[33] Cal. S. Comm. on Energy, Utils., & Commc'ns, SB 460 Analysis 1 (2018).
[34] RIF Order ¶¶254-256.
[35] Id. ¶ 260.
[36] Id. ¶ 265-266.
[37] Id. ¶ 246.
[38] Id. ¶ 168.
[39] Id.¶ 200.
[40] See ¶ 199.
[41] S. 289, Gen. Assemb., Reg. Sess. § 2(b)(1)(A–E) (Vt. 2018).
[42] See ACA v. Scott, No. 2:18-cv-00167 (D. Vt., filed Oct. 18, 2018).

[43] Cardinal Towing & Auto Repair v. City of Bedford, 180 F.3d 686, 692 (5th Cir. 1999); see also Wisconsin Department of Industry, Labor and Human Relations v. Gould, 475 U.S. 282 (1986).
[44] *Gould*, 475 U.S. at 289.
[45] 530 U.S. 363.
[46] *Id*. at 368.
[47] *Id*. at 376.
[48] *Id*. at 378.
[49] See City of Wilson, North Carolina Petition for Preemption, 30 FCC Rcd. 2408 (2015).
[50] Cf. SEC v. Chenery Corp., 318 U.S. 80 (1943) (discounting post-hoc rationalizations taken in litigation).
[51] *Geier*. at 883 (quoting Medtronic v. Lohr, 518 U.S. 470, 496 (1996)).
[52] Restoring Internet Freedom, 33 FCC Rcd. 311, 428 (2018).
[53] *Geier*, 529 U.S. at 883.
[54] RIF Order ¶ 196.
[55] Daniel A. Lyons, *State Net Neutrality Mandates and the Dormant Commerce Clause*, PERSPECTIVES FROM FSF SCHOLARS Vol. 14, No. 14 (2019).